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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979
No. 79—408

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,

Petitioners,

V.

PEOPLE OF THE STATE OF ILLINOIS AND PEOPLE OF THE STATE OF MICHIGAN,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF THE CITY OF DETROIT, AMICUS CURIAE

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INDEX

	PAGE
Interest of Amicus Curiae----------	2
Statement of the Case----------	5
Questions Presented----------	5
Summary of Argument----------	6
Argument	12
1. The City of Detroit Water and Sewerage Department (DWSD), as amicus curiae, supports the position taken by the City of Milwaukee that the Federal Water Pollution Control Act as amended by the Clean Water Act of 1977 controls the abatement of water pollution.-------	12
A. Comprehensive legislation embodied in the Federal Water Pollution Control Act, obviates the need for federal common law of nuisance.---	12
B. Section 505 of the FWPCA does not preserve a right to sue under federal common law for water discharge standards apart from the Act itself.----------	24

2. If the federal common law of nuisance survives the federal water pollution control act, as amended, strict parameters on its use and development by lower courts, including cost effectiveness considerations must be set.---------- 29

A. Lower courts must be guided by the policies of the FWPCA and must consider and weigh reliance on the Act and good faith efforts to comply with standards set by the Act.---------- 29

B. The decision of the Court below requiring total elimination of combined sewer overflows without regard to costs, cost effectiveness and funding considerations contravenes the congressional intent.------- 31

Conclusion---------- 36

CITATIONS

CASES:	PAGE
Arizona v. California, 373 U.S. 546 (1963)----------	7,17,23
California Tahoe Regional Planning Agency v. Jennings, 594 F. 2d 181 (9th Cir.1979) Cert. denied No. 79-15 Oct.1, 1979) ----------	18,23
Committee for the Consideration of the Jones Falls Sewage System v. Train, 539 F.2d 1006 (4th Cir. 1976)----------	10,20,21, 22,23,28 30
Erie R. Co. v. Tompkins, 304 U.S. 64 (1938)----------	10,28
Illinois v. Milwaukee, 406 U.S. 91 (1972)----------	6,7,8, 12,13,14, 16,17,18, 19,23,25
Illinois v. Milwaukee, 366 F.Supp. 298 (N.D. Ill. 1973)----------	19

Reserve Mining Co. v. Environmental Protection Agency, 514 F.2d 492 (8th Cir. 1975)---------- 19

Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448 (1957)---------- 10,28

Township of Long Beach v. City of New York, 445 F. Supp. 1203 (D.N.J. 1978)---------- 19,23,30

United States v. Ira S. Bushey & Sons, Inc., 363 F.Supp. 110 (D. Vt. 1973), aff'd mem. 487 F. 2d 1393 (2d Cir. 1973), cert. denied, 417 U.S. 976 (1973)-------- 20

United States ex rel. Scott v. United States Steel Corp., 356 F. Supp. 556 (N.D. Ill. 1973)---------- 17,18,19, 21,23

United States v. Stoeco Homes, 498 F. 2d 597 (3rd Cir. 1974) Cert. denied, 420 U.S. 927 (1975)---------- 20

United States v. City of Detroit
476 F. Supp. 512 (E.D. Mich.,
1979)---------- 3,34

STATUTES:

Federal Water Pollution Control Act,
as amended
Section 101, 33 U.S.C. 1251----- 7,8,11,
15,16,32
Section 217, 33 U.S.C. 1297----- 11
Section 301, 33 U.S.C. 1311----- 32
Section 402, 33 U.S.C. 1342----- 2
Section 505, 33 U.S.C. 1365----- 10,24,26,
27
Section 510, 33 U.S.C. 1370----- 7,8,25
Section 516, 33 U.S.C. 1375----- 33

COURT RULES:

S. Ct. R. 42(4)---------- 5

OTHER AUTHORITIES:

10 Environ. Rep. Current
Developments 1822-1823 (1/11/80)--- 35

Legislative History of the
Federal Water Pollution
Control Act, Amendments of 1972---- 9,14,26,
27

S. Rep. No. 414, 92nd Cong., 1st Sess., Reprinted in 2 U.S. Code Cong. & Ad News 3668, 3745-46 (1972)---------- 9

2 U.S. Code Cong. and Ad News 3758 (1972)---------- 15

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INTEREST OF AMICUS CURIAE

The City of Detroit is a Municipal Corporation duly organized and existing under the laws of the State of Michigan and is located in the County of Wayne, State of Michigan, with a substantial interest in the questions presented for review.

The City of Detroit, through its agency the Detroit Water and Sewerage Department (DWSD) has the responsibility for the operation and maintenance of a sewerage system and for the operation and maintenance of wastewater treatment facilities.

The State of Michigan, in 1974, pursuant to authority granted by the United States Environmental Protection Agency (EPA) under Section 402(b) of the FWPCA, 33 U.S.C. 1342 (b) issued a discharge permit to the City of Detroit which established specific requirements for sewage effluent discharges from the City's wastewater treatment plant.

The City of Detroit has, in recent years, been engaged in litigation with the United States Environmental Protection Agency (EPA) and the State of Michigan, Michigan Department of Natural Resources (MDNR) relevant to its conformance with federal and state water pollution control requirements. Effective on September 9, 1977, the parties entered into a Consent Judgment which, mandated compliance by the City of such matters as financial user charges, industrial cost

recovery, local capital cost funding systems, industrial waste control, staff training, secondary treatment, removal, effluent limitations, reporting and other requirements. Specific dates for compliance are spelled out in the Judgment. **United States of America v. City of Detroit**, et al., 476 F. Supp 512 (E.D. Mich 1979).

The DWSD provides three principal types of service to the City of Detroit and the surrounding suburban areas: potable water supply, sewage collection and disposal, and storm drainage collection and disposal.

The sewerage system provides collection, treatment and disposal of wastewater generated within its service area. The DWSD Sewer System presently serves an area of about 650 square miles in Wayne, Oakland and Macomb Counties; about 62 percent of the total area is served by separate sewers. The 140 square miles in the City of Detroit are essentially all on combined sewers; there are about 100 square miles of combined sewers in Oakland and Wayne Counties, generally adjacent to the Detroit City boundaries. Wastewater is collected from both individual retail customers and 75 governmental wholesale customers outside the City of Detroit and conveyed, either by gravity flow or by pumping, to the Wastewater Treatment Plant.

The DWSD operates a regional treatment facility, 18 sewage pumping stations, regulating facilities and 3,000 miles of collectors and interceptors.

The federal question presented in the instant case is a matter of continuing importance to the City of Detroit with far-reaching implications on all Municipal Wastewater Treatment Facilities. Briefly stated, the Federal question includes: whether the federal statutory law is paramount to the federal common law and whether federal courts may issue pollution abatement orders without regard to costs and cost-effectiveness considerations.

Federal courts should not have the power to prescribe wastewater treatment standards far more stringent than the federal law. Nor should federal courts have the power to order pollution abatement without regard to costs and cost-effectiveness considerations. There should be uniform application of the federal pretreatment standards as Congress intended.

If strict parameters are not imposed on the federal courts application and development of the federal common law, municipalities will be faced with wastewater treatment obligations above and beyond those required by federal statutes and with enormous financial obligations for which federal financial assistance will not be available.

The interest of the City of Detroit is thus predicated on the substantial and far-reaching consequences that any decision here may have for the abatement of pollution.

For these reasons, the issues here go far beyond the interests of the principal parties.

STATEMENT OF THE CASE

We respectfully refer the Court to the Citation of Opinions Below, the Statement of Jurisdiction, the Citation of Statutory Provisions Involved, and the Statement of the Case presented in the Petition for Writ of the City of Milwaukee, et al. filed with the Court in this proceeding.

The City of Detroit, by its Corporation Counsel respectfully submits this Brief Amicus Curiae, in support of Writ of Certiorari of the City of Milwaukee, et. al, pursuant to Rule 42(4) of the Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

1. Does the Federal Water Pollution Control Act Amendments of 1972 and the Clean Water Act of 1977, control the abatement of water pollution?

2. If the Federal Common Law of nuisance survives the FWPCA, strict parameters on its use and development by lower courts must be set.

SUMMARY OF ARGUMENT

In **Illinois v. Milwaukee**, 406 U.S. 91 (1972), this Court fashioned federal common law with respect to pollution of interstate waters. The Court did so because the remedy sought by the complaining party was not within the scope of remedies provided by the federal statute existing at that time. Application of the federal common law was not considered inconsistent with the FWPCA since the Act was neither comprehensive nor was it effective. However, the Court stated that the federal common law could be preempted by new federal law and regulations if that legislation were comprehensive.

> It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance...**Id.** at 107.

Until the field has been made the subject of comprehensive legislation or authorized administrative standards, only a federal common law basis can provide an adequate means for dealing with claims as alleged federal rights. **Id.** at 107 n.9.

Congress subsequently enacted new legislation, specifically the FWPCA Amendments of 1972 and the Clean Water Act of 1977. Congress designed this comprehensive federal statute to provide a uniform national program for the abatement of water pollution by means of federally mandated effluent limitations governing the discharge of pollutants. This substantially amended the previous Act which required states to set water quality standards.

Congress in Sections 101(b) and 510 of the Act preserved the right of the individual states to impose more stringent pollution control standards intrastate. However, states are not allowed to impose stricter standards on neighboring states.

The enactment of this comprehensive legislation in the area of water pollution control should fill the gap perceived by this Court in **Illinois v. Milwaukee, supra.** This Court has found the existence of comprehensive legislation precludes courts from applying federal common law. **Arizona v. California,** 373 U.S. 546 (1963).

Lower courts have read **Illinois v. Milwaukee, supra,** as authority to apply federal common law to interstate and sometimes intrastate pollution problems despite the enactment of new federal statutes and regulations. Some courts have failed to recognize this issue. Other courts have recognized the issue but have been unwilling to find that the

1972 Amendments or the Clean Water Act of 1977 have preempted the federal common law. The courts have not wished to disturb this Court's decision in **Illinois v. Milwaukee** because the question of preemption has been clouded or overlooked in favor of applying federal common law. The opinions of the lower courts indicate a need for direction on this issue.

The federal statute controls the area of abatement of water pollution. If dischargers are required to remain subject to suits based on federal common law, the intent of Congress to provide a uniform comprehensive program for the elimination of water pollution will be undermined. Courts with limited ability and resources to make intelligent scientific determinations regarding pollution control will be allowed to fashion relief and set standards beyond that anticipated under the Act. Continuous major adjustments will be made to a statutory scheme designed and enacted to insure uniform control and abatement of water pollution.

The State of Illinois asserts that there is no preemption of more stringent requirements than those imposed under the 1972 Act and cites Section 510 of the Act. Section 510 allows a state to impose stricter standards of effluent discharge than those set by EPA within that state. However, the FWPCA does not allow a state to impose its stricter standard on pollution in another state. That Section 510 only permits state control of intrastate pollution is re-

flected in provisions of the section itself. Section 510 is not applicable to this case since it involves interstate pollution. Section 510 also makes it clear that within the minimum standards, there is no preemption of State law. However, the issue in this case is not preemption of state law but whether the federal statute controls in the field of water pollution such that there is no longer a need for federal common law.

The State of Illinois also asserts that Section 505(e) expressly saves all common law actions. However, the intent of Congress to include federal common law is not clearly expressed on the face of the statute. Section 505 read as a whole seems to permit citizens to sue for violations of established water pollution requirements. It also permits courts to award to citizens, actual damages under other legal theories proven and that can be proven - an area not covered by the Act. The legislative history clearly indicates that Section 505 does not substitute a common law or court-developed definition of water quality (**Legis. Hist.** 1497). Section 505(e) does not preserve federal common law water quality standards. Citizen suits are limited to enforcement of established standards, the same standards enforceable under administrative enforcement procedures. (**Legis. Hist.** 1498) Citizen suits are designed to supplement administration action, not to provide new standards. S Rep 92-414, 92nd Cong. 1st Sess., in 2 U.S. Code Cong. & Ad. News 3668, 3745-46 (1972).

General federal common does not exist. **Erie R. Co. v. Tompkins,** 304 U.S. 64 (1938), although courts may create it to fill statutory interstices. **Textile Workers Union of America v. Lincoln Mills,** 353 U.S. 448 (1957). It is therefore arguable that Congress intended Section 505(e) to apply only to state common law remedies and not federal common law remedies. **Committee for Jones Falls Sewage System v. Train,** 539 F. 2d 1007, 1009 n9 (4th Cir. 1976). There is no evidence Congress intended Section 505(e) to be a mechanism by which a district court judge could set interstate water quality standards apart from the Act itself. The legislative history indicates otherwise. The clear intent of Congress was the enactment of a comprehensive federal statute governing abatement of pollution in the nation's waters.

The Court below held that despite Congress' enactment of the 1972 and 1977 Acts which contain no provision expressly prohibiting "combined sewer overflows", Milwaukee must eliminate all overflows outside its combined sewer system by July 1, 1986 and construct a collection and conveyance system for the combined sewer system that will eliminate overflows on the combined sewer system by December 31, 1989.

If courts are allowed to fashion common law relief without regard to cost and cost effectiveness and order abatement above and beyond that provided by Congress, municipal wastewater treatment plants with pollution control plans made in reliance on the federal statute will be in constant jeopardy, facing dramatically different wastewater treatment requirements with no expectation of federal financial assistance.

It is clear, Congress recognized federal financial assistance and the consideration of costs are important elements in resolving the water pollution problems.

The Congressional statement of policy in the 1972 Act, provides: "It is the National Policy that Federal financial assistance be provided to construct publicly owned treatment works. Sec. 101(a) (4) (1251 (a) (4))

The 1977 Act requires "any guidelines for cost effectiveness analysis published by the administrator under this title shall provide for the identification and selection of cost effective alternatives to comply with the objective and goals of this Act...." Clean Water Act Section 217, 33 U.S.C. 1297 (1977).

The intentions of Congress are thwarted if courts are allowed to fashion relief without consideration of the policies and standards set by the FWPCA. If guidelines for the use and development of the federal common law nuisance with respect to water pollution are not established, the potential for injury to parties relying on the federal statute is very grave in terms of costs, cost effectiveness and federal grant funding.

ARGUMENT

I. The City of Detroit Water and Sewerage Department (DWSD), as amicus curiae, supports the position taken by the City of Milwaukee that the Federal Water Pollution Control Act as amended by the Clean Water Act of 1977 controls the abatement of water pollution.

A. Comprehensive legislation, embodied in the Federal Water Pollution Control Act, obviates the need for federal common law of nuisance.

This Court in **Illinois v. City of Milwaukee**, 406 U.S. 91 (1972), perceived a need to fashion federal common law with respect to pollution of interstate waters in a situation where the remedy sought by the complaining party was not within the scope of remedies provided by the federal statute as it existed at that time. When this Court decided that case, neither the

1972 amendments to the Federal Water Pollution Control Act (FWPCA) nor the Clean Water Act of 1977 had been enacted by Congress. This Court noted that the procedure for abatement of water pollution at that time was long and drawn out. States were required to establish ambient water quality standards. If a state failed to do so, the EPA administrator would establish the standards. A conference procedure was used, with final action on the part of the administrator being a request to the Attorney General to bring suit on behalf of the United States for the abatement of water pollution.

Application of federal common law to abate a public nuisance in interstate water was not considered inconsistent with the FWPCA by the Court. However, this Court noted that the federal common law they had fashioned could be pre-empted by new federal laws or regulations.

> It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution. **Illinois v. Milwaukee,** 406 U.S. 91, 107 (1972).

Application of federal common law to abate a public nuisance in interstate water was not considered inconsistent with the FWPCA by the Court. However, this Court noted that the federal common This Court added:

> Until the field has been made the subject of comprehensive legislation or authorized administrative standards, only a federal common law basis can provide an adequate means for dealing with claims as alleged federal rights. **Id.** at 107 n.9.

Congress, by the enactment of the 1972 amendments to the FWPCA (PL 92-500) and the Clean Water Act of 1977 has addressed the concerns expressed by this Court in **Illinois v. Milwaukee, supra.** A comprehensive federal statute was designed to provide a uniform national program to abate water pollution.

The lack of uniformity in the old Act was of particular concern to the Congress.

> ....there are three essential elements to it: Uniformity, finality and enforceability. Without these elements a new law would not constitute any improvement on the old: We would not bring a conference agreement to floor without them. **Legislative History,** 162 fn

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fn....All citations to the legislative history are to "A Legislsative History of the Water Pollution Control Act Amendments of 1972," prepared by the Environmental Policy Division of the Congressional Research Service of the Library of Congress (Committee Print 1973).

The Congress also responded to the haphazard manner in which water pollution had been previously handled.

> Water pollution control in the past has all too often been sporadic, inconsistent and improvised on an ad hoc basis. The major purpose of this legislation is to establish a comprehensive long-range policy for the elimination of water pollution, making it clear to industry and municipalities alike the pollution control performance which will be expected over the next decade. 2 **U.S. Code Cong. and Ad. News** 3758 (1972)

The thrust of Congressional action was changed from an act requiring states to set water qualiity standards to federally mandated effluent limitations on the discharge of pollutants. This is reflected in the Act's Declaration of Goals and Policy:

> Sec. 101(a) The objective of this Act is to restore and maintain the chemical, physical and biological integrity of the Nations's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act_____

(1) it is the national goal that the discharge of pollutants into the navigable water be eliminated by 1985....fn

Section 101(b) and Section 510 of the Act preserve the rights of the states to prevent and eliminate pollution and to impose more stringent pollution control standards. Management of construction grant programs under the Act is also placed in the hands of the states.

In this way Congress chose to allow the states room to provide for stricter standards than the minimum effluent limitations set by the enforcing agency. It also provided for "citizen suits" under Section 505 of the Act. However, Congress did not intend for states to impose their individually enacted stricter standards on neighboring states.

The enactment of this comprehensive legislation governing abatement of water pollution, coupled with the enforcement procedures included in the Act, leaves no room for courts to continue to fashion equitable remedies based on federal common law. The void recognized by this Court in **Illinois v. Milwaukee, supra,** has been filled.

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fn The Federal Water Pollution Control Act, as amended, is codified in 33 U.S.C. 1251 et seq. Hereinafter it will be referred to as "the Act" or "FWPCA".

This Court found that comprehensive legislation precludes courts from applying federal common law in **Arizona v. California,** 373 U.S. 546(1963). In that case a comprehensive scheme for allocation of waters of the Colorado River among the states had been created by Congress. That scheme was held to preclude fashioning of relief based on common law. This Court wrote:

> Where Congress has so exercised its constitutional power over waters, courts have no power to substitute their own notion of an "equitable apportionment" for the apportionment made by Congress. (**Id.**, at 565)

This is precisely the situation this Court in **Illinois v. Milwaukee** addressed with regard to eventual preemption of federal common law by new federal statutes governing water pollution control.

However, lower courts have failed to recognize this issue and have read **Illinois v. Milwaukee, supra** as authority to apply or invent federal common law despite the enactment of new federal statutes and regulations. At least one court seems to have recognized this as the issue, and applied federal common law only because the new Act had not yet been effectuated. In **United States ex rel Scott v. U.S. Steel Corp,** 356 F. Supp. 556 (N.D. Ill 1973), the Court spoke to the issue of whether the FWPCA as amended "completely occupied the field and ousted this court from common law jurisdiction." (**Id.** at 558-559). The Court noted that the amendments became effective twelve days after the filing of **Scott,** and stated:

> At least until the Environmental Protection Agency has acted effectively, the hands of the plaintiff governments are not tied. **U.S. ex rel Scott v. U.S. Steel Corp. supra,** at 559.

However, that Illinois District Court refused to find the new federal law preempted federal common law because the Act did not specifically so state. Instead the court stated the intention of the statute to "supplement and amplify any preexisting remedies." (**Id.** at 559)

Other courts have not felt the decision of this Court in **Illinois v. Milwaukee, supra,** establishing federal common law in this area, could be disturbed. Many have chosen not to address the Court's remark regarding possible preemption.

Most recently, in **California Tahoe Regional Planning Agency v. Jennings,** 594 F. 2d 181 (9th Cir. 1979), cert. denied No. 79-15 (Oct 1, 1979), the Ninth Circuit correctly interpreted that **Illinois v. Milwaukee, supra,** held that the FWPCA had not yet occupied the field and noted that courts continued to hold thus even after the 1972 amendments. The Ninth Circuit declined the invitation to reach a different conclusion. (**Id.** at 193).

Similarly the New Jersey District Court in **Township of Long Beach v. City of New York,** 445 F. Supp 1203 (D.N.J., 1978), was faced with the question of whether the 1972 amendments effected the preemption issue set forth in **Illinois v. Milwaukee.** The New Jersey Court noted that in at least two cases which held there was not preemption the new amendments had not yet been effected or regulations has not been adopted: **U.S. ex rel. Scott v. U.S. Steel Corp., supra,** and **Illinois v. City of Milwaukee,** 366 F. Supp 298 (N.D. Ill. 1973). At least one other court found it unwise to rely on federal nuisance law. **Reserve Mining Co., v. United States,** 514 F. 2d 492 (8th Cir. 1975). The New Jersey District Court, however, felt the need for clarification of the effect of the 1972 amendments on the preemption issue and wrote:

> At this time, I will therefore deny the motion to dismiss based on preemption without prejudice to a renewal thereof after further clarification to the nature of this suit, the new regulations and their effect on the preemption issue. (**Id.** at 1215)

Generally, the preemption issue has been clouded or overlooked in favor of applying the federal common law. The federal common law has been held applicable particularly with respect to interstate situations, and in some cases the issue of preemption was not addressed because the 1972 amendments had not yet

been enacted. See **United States v. Ira S. Bushey & Sons, Inc.**, 346 F. Supp 145 (D.Vt.1972) aff'd. mem. 487 F. 2d 1393 (2nd Cir. 1974), cert. denied 417 U.S. 976 (1974) **U.S. v. Stoeco Homes,** 498 F. 2d. 597 (3rd Cir 1974), cert. denied, 420 U.S. 927 (1975).

In **Committee for Jones Falls Sewage System v. Train,** 539 F. 2d 1006, 1007 (4th Cir. 1976), the Court found there was no body of federal common law which conferred rights upon private citizens to enjoin intrastate pollution which was not enjoinable under the FWPCA Amendments of 1972. The Fourth Circuit noted that the federal common law governing water pollution was fashioned to resolve interstate pollution controversies. Finding the controversy in that case to be purely local, the Court stated that Maryland law was adequate to govern the situation. With respect to any federal interest, the Fourth Circuit noted that it was expressed through the FWPCA Amendments of 1972.

> To the extent there is a federal interest, it is expressed in the Federal Water Pollution Control Act Amendments of 1972, but the plaintiffs have no claim based upon that statute. (**Id.** at 1009)

The Fourth Circuit explained that the federal common law of nuisance had not been extended beyond abatement of public nuisance in interstate controversies involving "extra-territortal harm" (**Id.** at 1009). The Court, however, noted that in **U.S. ex rel Scott** there was no allegation of any interstate effect. Citing other cases which upheld the federal common law concept, the Fourth Circuit noted:

> The question is not before us, but the proposition of these cases may be questionable now that the 1972 Amendments of the Federal Water Pollution Control Act are effective. (**Id.** at 1009 n7)

Finally, the Fourth Circuit stated with respect to federal common law:

> Indeed, it would be an anomaly to hold that there was a body of federal common law which proscribes conduct which the 1972 Act of Congress legitimates.....
>
> While the state courts are free to apply state nuisance law more rigidly, a federal court in such a local controversy may not turn to a supposed body of federal common law to impose stricter standards than the statute provides. (**Id.** at 1009)

While the Fourth Circuit spoke only to a local controversy, the City of Detroit, as **amicus curiae**, submits that it would be an anomaly to hold that there is a body of federal common law which proscribes conduct which the 1972 Act of Congress legitimates in an **interstate** controversy. The Court in **Jones Falls** is correct that state courts may apply more rigid standards under a state nuisance law and federal common law should not govern. It is also correct that states may apply their more rigid standards **intrastate** but may not use federal common law to apply their more rigid state standards to neighboring states which have not promulgated such rigid standards, even if an interstate body of water is involved.

The federal statute controls the area of pollution of navigable national waters. If a discharger remained subject to suits under a theory of federal common law applied by the courts, the intent of Congress to provide a uniform, comprehensive program for abatement of water pollution would be forever lost to case by case determinations by courts not dissimilar from the lower court in this case, where the Judge clearly recognized the limits of his ability to make an intelligent scientific determination regarding abatement of water pollution.

The question of whether the FWPCA amendments of 1972 and the Clean Water Act of 1977 control the field of abatement of water pollution including interstate controversies has not been specifically addressed by this Court. **Illinois v. Milwaukee,** 406 U.S., 91 (1972) may be construed as inviting Congress to take new steps to more effectively legislate the abatement of water pollution. The language of that opinion seems to suggest the willingness of this Court to allow the legislative branch the opportunity to enact laws that would have the effect of preempting the federal common law, which is a special and extraordinary remedy. That attitude of this Court is given further support by its opinion in **Arizona v. California, supra,** where this Court refused to fashion law where Congress had made a firm legislative decision regarding the matter.

The lower courts have misconstrued the intention behind the fashioning of federal common law in **Illinois v. Milwaukee, supra.** Recent decisions cite the existence of federal common law with reference to cases decided **before** the advantage of effective federal legislation. No court has been confident enough to decide the questions of preemption even though the question has been recognized. **Comm. for Jones Falls Sewage System v. Train, supra; California Tahoe Regional Planning Agency v. Jennings, supra; Township of Long Beach v. City of New York, supra; United States ex rel. Scott v. U.S. Steel Corp., supra.**

Direction is needed from this Court. Municipalities and governmental agencies should not be put into a position of compliance with a federal statute only to be sued on a theorty of federal common law nuisance, and held to a level of pollution compliance beyond that set by federal statutes and accompanying regulations. The effect of such a situation would be continuous major adjustments to a statutory scheme enacted to insure uniform control and abatement of pollution in the nation's waters.

B. Section 505 of the FWPCA does not preserve a right to sue under federal common law for water discharge standards apart from the Act itself.

The State of Illinois argues that there is no preemption of more stringent requirements than those imposed under the 1972 Act by pointing to Section 510 of the Act. Clearly, that section does allow a state to impose standards for effluent discharge stricter than those set forth by the EPA **within that state.** In an effort to balance state autonomy with the growing need for a uniform, federal program for the abatement of water pollution, Congress has allowed states to control, with minimum federal standards, effluent discharge within each state. However, nowhere in the FWPCA does Congress permit a state to establish and impose stricter standards on pollution occurring in another state. Section 510 is clearly not applicable to the case

before this Court. It merely allows a state to control intrastate pollution. This case involves interstate pollution. It is irrelevant to assert that Illinois could have more stringent effluent limitations; it is irrelevant to inquire whether Illinois did have more stringent effluent limitations. These are questions of state law, which the Supreme Court, in **Illinois v. Milwaukee,** 406 U.S. 91, 102 (1972) found inapplicable in such a situation as interstate pollution.

Respondent State of Illinois infers, however, that since Congress allowed stricter standards in Section 510 that suggests an intent to allow stricter standards in all circumstances, including interstate pollution. However, Congress made it clear that Section 510 is limited to intrastate pollution when it included in that Section the statement that "nothing in this Act shall....(2) be construed as imparing.....any right or jurisdiction of the States with respect to the waters (including boundary waters) of such states." Surely, Section 510 is part of the Act, and therefore cannot be used by one State to impair the rights of another. Section 510 can be seen, therefore, as allowing stricter intrastate standards, as a Congressional recognition of state autonomy. However, there is no explicit or implicit intent to allow standards which differ from those set forth in the Act when interstate pollution is involved.

It must be made clear that this case is not concerned with federal pre-emption of state law; Section 510 clearly indicates that within minimum standards, there is no such pre-emption. The issue is whether federal statutory law controls the field of water pollution law, or whether there is still a need for federal common law. Illinois argues that Section 505(e) of the Act expressly saves all common law actions. That Congress meant to include federal common law actions is not clearly expressed on the face of the statute.

But the thrust of Section 505 (which must be read as a whole) seems to permit citizens to sue for violation of established water pollution requirements, and to be awarded damages under other legal theories that can be proven. But, as the Senate Report remarked, "Section 505 would not substitute a 'common law' or court-developed definition of water quality." (**Legis. Hist.** 1497) The common law, as preserved by 505(e), would allow recovery of actual damages, an area not covered by the Act. However, 505(e) does not preserve federal common law water quality standards, since those are provided for in the Act. Further comment in the Senate Report supports this analysis: "(T)he section would specifically preserve any rights or remedies under any other law. Thus, if **damages could be shown**, other remedies would remain available." (**Legis. Hist.**, 1499) (Emphasis added) However, the standards would remain the same.

"The standards for which enforcement would be sought either under administrative enforcement or through citizen enforcement procedures are the same." **(Legis. Hist.** 1498.) Since, as the legislative history makes clear, citizen suits are limited to enforcement of established standards, it would be illogical to read Section 505(e) as allowing suits to establish new standards.

Elsewhere in the Senate Report it is clearly stated that citizens' suits were designed to **supplement** administrative actions to abate violations of the Act, not to provide new standards. S Rep 92-414, 92nd Cong. 1st Sess., in 2 U.S. Code Cong. & Ad. News 3668, 3745-46(1972). During hearings before the House Committee on Public Works regarding House Bill 11896, which eventually was combined with Senate Bill 2770 to form PL 92-500, Russell Train, Chairman of the Council on Environmental Quality, testified that "We felt it very important that citizen's suits be directed towards enforcing standards set by law and regulatons, rather than hypothetical standard which are not related to statutory and regulatory enactment." (**Legis. Hist.** 1153) Section 505 does not anticipate creation of a new set of standards for each suit, but merely permits citizens to sue for damages and/or enforcement of pre-existing standards. Section 505(e) must be

read consistantly with the entire section, as preserving common law actions that would also provide for damages and/or enforcement of pre-existing standards. Respondent State of Illinois asserts that a common law nuisance is not a statutory action brought under 505; but is an action preserved by 505(e), which speaks of common law. General federal common law does not exist (**Erie R. Co. v. Tompkins,** 304 U.S. 64 (1938)); although, federal courts can create it to fill statutory interstices (**Textile Workers Union of America v. Lincoln Mills,** 353 U.S. 448 (1957)), it is arguable that Congress did not intend Section 505(e) to apply to **federal** common law, but only state common law. This was the view of the Fourth Circuit in **Committee for Jones Fall Sewage v. Train** 539 F.2d. 1007, 1009 n9 (4th Cir. 1976). At most, Congress could have intended 505(e) to preserve the federal common law that filled those statutory interstices, in the FWPCA, such as actions for damages. There is no evidence that the legislature felt 505(e) was a source of interstate water quality standards, to be set by a district judge, apart from the Act itself; indeed, as set forth above, the legislative history indicates otherwise. This is consistent with the structure of our federal government: Congress is the factfinding body, not the judiciary, in areas of federal concern, such as interstate pollution.

II. IF THE FEDERAL COMMON LAW OF NUISANCE SURVIVES THE FEDERAL WATER POLLUTION CONTROL ACT, AS AMENDED, STRICT PARAMETERS ON ITS USE AND DEVELOPMENT BY LOWER COURTS, INCLUDING COST EFFECTIVENESS CONSIDERATIONS MUST BE SET.

A. Lower courts must be guided by the policies of the FWPCA and must consider and weigh reliance on the Act and good faith efforts to comply with standards set by the Act.

Strict parameters on the use and development by the lower courts, of the federal common law of nuisance must be set if this Court finds the FWPCA does not preempt the field of abatement of water pollution. Consideration must be given to municipalities and governmental agencies that rely on standards set pursuant to the FWPCA and make good faith efforts to comply with those standards.

Nuisance, as applied in the lower courts is primarily an action to protect one's property rights when they are invaded by the alleged misconduct of another. The reasonableness of the alleged misconduct must be weighed against the importance of the property rights seeking protection. Consideration must also be given to the potential for injury or inconvenience to the defendent party along with action taken by the defendant to limit the damage to property rights.

Courts fashioning relief based on federal common law as applied to the abatement of water pollution have recognized the necessity for some standard. In **Township of Long Beach v. City of New York, supra,** the New Jersey District Court stated:

> The absence of special injury also is said to bar both the federal and state common law nuisance claims. (**Id.,** at 1215.)

This would seem to imply that some special injury be required to trigger principles of federal common law nuisance. This is in line with the established policy that federal common law relief is an extraordinary remedy.

Courts should also be required to consider the policies and standards set by the FWPCA when a case is brought on the federal common law theory. Judge Butzner, dissenting in **Committee for Jones Falls Sewage System v. Train, supra,** stated:

> In developing the federal common law of water pollution, the district courts may draw on the policies expressed in the 1972 Amendments, other federal legislation such as the Rivers and Harbors Acts of 1899, principles of the federal common law of nuisance, and applicable state laws. (**Id.,** at 1014) (Citation omitted)

This Court should go further and mandate the the lower courts focus attention on the policies and requirements of the FWPCA which Congress fully intended to govern this area. Without such attention courts may be allowed to fashion remedies and set standards without the benefit of the legislative fact finding authority and expertise available under the FWPCA through the Environmental Protection Agency.

The intention of Congress to enact uniform and comprehensive legislation for the eventual elimination of water pollution is undermined if courts are allowed to fashion relief above and beyond that provided by the Congressional scheme. Moreover, municipalities and governmental agencies with pollution control plans made in reliance on the federal statute will be in constant jeopardy of court ordered relief dramatically different from that anticipated under the Act, if this Court does not impose guidelines for the development of the federal common law. The potential for injury to a party relying on the federal statute is very grave especially in terms of costs.

B. The decision of the Court below requiring total elimination of combined sewer overflows without regard to costs, cost effectiveness and funding considerations contravenes the congressional intent.

That Congress recognized federal financial assistance would be necessary to correct the problems of water pollution is clearly stated in the Congressional statement of policy in the 1972 Act:

> "It is the National policy that Federal financial assistance be provided to construct publicly owned waste treatment works ....."
> "Sec. 101(a)(4) (1251(a)(4))

In the 1977 amendments to the 1972 Act Congress further recognized the need to provide for extensions of time to meet the requirements of the 1972 Act where construction is required in order for a planned or existing publicly owned treatment works to achieve limitations....., but (A) Construction cannot be accomplished within the time frame.... or (B) the **United States has failed to make financial assistance under this Act available** in time to achieve such limitations.....", the EPA administrator or if appropriate the State may extend the compliance date to July 1, 1983. Sec. 301(i) 33 USCA Sec. 1311(i) (Emphasis added)

Congress, cognizant of the fact that federal financial assistance would be required, and that consideration should be given to cost effectiveness, directed the administrator of EPA to submit a report to the Congress including "(B) a detailed estimate biennially revised, of the cost

of construction of all needed publicly owned treatment works in all of the states and of the cost of construction of all needed publicly owned treatment works in each of the states; "(C) a comprehensive study of the economic impact on affected units of government of the cost of installation of treatment facilities;...." Sec. 516(b), 33 U.S.C. 1375 (b).

In addition, with regard to combined sewer overflows, Congress further directed the study include:

> (3)an estimate for each applicable municipality of the number of years necessary, assuming an annual authorization and appropriation for the construction grants program of $5,000,000,000, to correct combined sewer over flow problems", and
>
> (5)an analysis of the technological alternatives available to municipalities to correct major combined sewer overflow problems." Id.

The District Court in the **United States v. City of Detroit, et al,** 476 F. Supp 512 (E.D. Mich., 1979) also recognized that the problems of water pollution cannot be solved without regard to costs and the availability of federal financial assistance. In that case, the State of Michigan and its municipalities was threatened with loss of fiscal year 1976 federal grant funds of approximately $400 million dollars for failure to achieve certain requirements as mandated by the 1972 Act. The Court issued an order restraining the United States Environmental Protection Agency from re-allocating such funds to any other state and to reserve a portion of said monies for the City of Detroit.

Further, in this same case, following the issuance of an Order to Show Cause in October of 1978, against the City of Detroit for violations of the Consent Judgment, the Court declined to give the United States its requested relief of fines and penalties, finding that the same would be "counter-productive". However, following extensive hearings, the Court found that the City of Detroit, not withstanding substantial achievements, had not complied with certain requirements of the Consent Judgment and the federal law regarding abatement of water pollution. The Court appointed an Administrator of Operations to manage and control the wastewater treatment plant and ordered a full scale plant evaluation to be held during the

summer of 1979 in order to determine that the Consent Judgment should be amended and this was done. The Amendmended Consent Judgment recognizes the need for federal assistance and considers cost-effectiveness in fashioning the remedy. In particular, with regard to combined sewer overflows the Judgment requires a program for the attainment of "control" of overflows rather than "elimination" in a cost-effective manner.

The Amended Consent Judgment creates an Interagency Group comprised of representatives of the several agencies "whose sole purpose is to provide a forum for coordination between the parties and for expediting any action necessary for compliance, regarding planning, construction, operations, **funding**, review and approval....." (Emphasis added). Thus, the district court in the sixth Circuit expressed its indication that Detroit's mandated obligation to comply with the Act and the Consent Judgment is tied to considerations of costs effectiveness and federal grant funding.

In a recent report prepared by the General Accounting Office (GAO) for Senator Charles Percy it was recommended that the Clean Water Act be amended to allow a more cost-effective solution to the problems of sewage pollution of the U.S. waterways. See 10 **Environ Rep. Current Developments** 1822-1823 (1-11-80).

CONCLUSION

The judgment of the court of appeals insofar as it concludes that the FWPCA does not preempt the federal common law of nuisance and, insofar as it preserves a right to sue, based on Section 505 of the FWPCA, under federal common law for water standards different from those set by the Act and, insofar as it orders relief above and beyond that provided by the Act and without regard for costs, cost effectiveness and funding considerations, should be reversed.

Respectfully Submitted,

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